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THE PROS AND CONS OF REGULATING FIDUCIARY AND ATTORNEY FEES[1]

From now until the year 2050, the United States Census Bureau projects the number of persons between 65 and 84 years of age will increase by 113.8 percent and the number of persons 85 years of age and older will increase 388.9 percent. (U.S. Census Bureau, 2004, *U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin.*) The services provided by fiduciaries and elder law attorneys will become ever more important than they are now as the need for such services expands exponentially. The public fiduciary system cannot serve all of the persons who, merely through advancing age and the accompanying health issues will need help. If fiduciaries cannot afford to run their businesses and make a profit due to over-regulation and micro-management of the industry, they will find other avenues for their skills. If elder law attorneys cannot afford to serve as court-appointed representatives for elders in need due to artificially reduced hourly rates then they will not serve and courts will be hard-pressed to protect the rights of elders in the system.

There are currently systems in place to protect elders and the disabled from the

[1]Written materials have been updated through July, 2009, and are more extensive than those provided at the live discussion.

unscrupulous. Courts have reviewed attorneys' and expert bills for services for many, many years. Improvement is always appropriate–drastic overhauls are not necessary. The following will discuss the services provided, applicable case law and regulation and suggestions for quality control and improvement in the current system.

WHO ARE FIDUCIARIES AND WHAT DO THEY DO?

Fiduciaries are a profession in Arizona, just like lawyers, doctors, CPA's and other licensed professionals. They come from backgrounds as varied as the wards whom they serve. They were bankers, brokers, insurance agents, social workers, paralegal, lawyers, nurses, police officers, business owners, judges, real estate agents, and care givers, among others.

Fiduciaries are legally obligated to make decisions on accessing or withholding medical care that even doctors are not permitted to make on behalf of others.

Fiduciaries are legally mandated to enter buildings and conduct inventories in structures where fire personnel and building inspectors would fear to tread.

Fiduciaries are required to understand every hazardous substance and communicable disease from old shotgun shells leaking nitroglycerin to MRSA.

Fiduciaries must have a working knowledge of not only the rules and regulations related to being a fiduciary, but also *all* statutes and regulations which might affect or impact their clients, from the IRS Code to securities regulations, VA Benefits theories, ALTCS regulations to local building codes.

Fiduciaries are required to manage: large sums of monies, sophisticated investment plans, real estate and complex litigation against those who have injured their wards using the same high standards that a trust officer, a CPA or an attorney.

Fiduciaries are required to protect their clients from exploiters, abusers, friends, family and often from the wards themselves. The fiduciary in this situation has to be a psychiatrist, counselor, mediator, body guard and sometimes police officer–often at risk to their own safety, to protect their ward.

Fiduciaries must be prepared to leave their own family's holiday table, or the comfort of their warm cozy beds to handle any myriad of emergencies from a broken pipe in the client's home to a medical crisis.

Fiduciaries are currently subject to audit annually by the Court, to Social Security and Veterans Administration if those entitlements are received by the ward, random audit by the Administrative Office of the Courts and investigative audit upon complaint. The latter two are not just financial audits, but also audit of every action and every decision made by the fiduciary with respect to the client or the estate.

This is in addition to the state and federal agencies who audit all types of business, such as the Internal Revenue Service, the Arizona Department of Revenue, the Industrial Commission, and Homeland Security, just to list a few.

Fiduciaries are targets for complaints, objections and lawsuits from their incapacitated wards who are incapable of understanding their own need for Court intervention and protection, exploiters who are no longer allowed to steal, disgruntled family members who just want control and others seeking to further their own agenda rather than work for the good of the client.

Fiduciaries have to use their own credit and sometimes pledge their own assets in order to be bonded, as bonds are required for all conservatorships and probates. Sometimes they have to front their own monies to pay for services until the clients' funds can be accessed.

And, oh yes, fiduciaries can be sued for malpractice–just like any other professional.

Fiduciaries have always been paid in Arizona–even before Ariz. Rev. Stat 14-5651 was enacted by the Arizona Legislature in response to a few bad apples who had abused their position and stolen from their clients.

An argument could be made that no one individual could possibly be qualified to perform all of these necessary and required services. But the reality is that certified fiduciaries in Arizona perform these tasks and a myriad of others every day, and perform them well.

When the certification program was authorized by the Legislature, and implemented by the Arizona Supreme Court Administrative Office of the Courts, there was no model program. The model was developed here to the envy of many other states.

Certainly there have been growing pains along the way. But the way in which fiduciaries charge for their services is not among the problems with which the regulatory process has had to grapple.

And, the regulatory process is not the final answer for the growing pains of the profession of certified fiduciaries. The answer is education for all professionals and consumers who may come into contact with those attorneys on the outskirts of the community who promulgate inappropriately hostile and destructive positions against fiduciaries.

Fiduciaries have to charge for their work, and they have to charge enough to make a living. They have to charge enough for the risks they assume to be worthwhile. It is not appropriate or practical to think that a uniform charge can be set for fiduciaries in such a diverse state like Arizona. To accomplish this myriad of tasks, fiduciaries must be allowed the freedom to obtain guidance from other qualified professionals such as lawyers, CPAs and brokers.

UNIFORM PRACTICES DO NOT WORK AND ARE NOT AVAILABLE

A few years ago the Mental Health and Elder Law Section of the State Bar conducted a survey among all Arizona counties to determine whether uniform forms and practices could be implemented in guardianship and conservatorship cases. The conclusion was that it could not. Though the counties all follow the same set of statutes, the availability of court investigators, court appointed attorneys and, most importantly, certified fiduciaries, varied greatly. The procedures which might work in Maricopa or Pima Counties just would not work in the outlying counties. Even Maricopa and Pima Counties do not have uniform practices–and probably never will. Compare Maricopa Local Rule 5.16 to Pima County Local Rule 9.2 regarding accounting requirements. Even though uniform probate rules were adopted in January, 2009, to be used by all Superior Courts in Arizona, the individual practices of each court varies particularly in such areas as appointing an attorney or investigator for a proposed ward.

The same result occurs on the national level. A study commissioned by the American Bar Association Commission on Law and Aging indicated a significant disparity among states as to the appointment of attorneys in guardianship proceedings and the role of counsel once appointed. The study found that in Colorado, Hawaii, Illinois, Nebraska, counsel is appointed if the person against whom a guardianship petition is filed requests an attorney which might be a difficult task for a brain-injured person who cannot recognize their own need for assistance. Many states use a guardian ad litem instead of court appointed counsel. Some states only use court appointed

counsel if there is a conflict with the guardian ad litem. {American Bar Association Commission on Law and Aging and Sally Hurme (July, 2006)} Only a few states identify the role of the court appointed attorney, and among those, that role appears to be that of a guardian ad litem.

Another study found that there is very little statistical data accumulated by most states, including Arizona, regarding the number of guardianship/conservatorship cases being filed across the country, let alone monitoring of those cases once a fiduciary is reported. {Erica F. Wood, American Bar Association, Commission on Law and Aging for the National Center on Elder Abuse, *State-Level Guardianship Data: An Exploratory* Survey (August, 2006)}

In the absence of statistical data *anywhere* to substantiate a problem and the need for uniform payment schedules for fiduciaries, their attorneys and/or court appointed attorneys, no changes should be made. Existing law is sufficient to ferret out the "few bad apples" who might take advantage of their authority. In other words, *if it ain't broke–don't fix it.*

Fiduciaries, their attorneys and court-appointed attorneys should comply with existing law and provide as much information as possible in their billing statement, but when that information includes subject matter about legal or medical issues, it means those statements will have to be sealed from the general public in order to protect the client's privacy. After all, that is what fiduciaries and attorneys do–protect their wards.

There is no need to make it easier to challenge fiduciaries' and attorney's billings. It is already far too easy for challenges to be brought by disgruntled family members who are more interested in the size of their inheritance than the client's best interest or other, non-family members in the pursuit of personal agendas–again having nothing to do with the client's best interest. Under the present system, all the disgruntled have to do is file an objection, and the

fiduciary and the lawyer then has to sit in the "hot seat" and defend the work they have already performed and the hours and costs already expended. It is far too easy to be the arm-chair quarterback in these cases stating rates or hours are unreasonable.

Fiduciaries, and even attorneys, often find themselves in the untenable position of having to reduce their fees–not because their rate was unreasonable or the hours excessive–but just to stop the litigation by the inscrutable and thereby protect the client's assets (if the client is paying the legal fees) or their own finances (if the fiduciary is paying the legal fees.)

What should happen is that these objectors should be put to their proof, using the same standard of proof which is required of any other challenge to a professional's work in Arizona. If the objector files the objection in bad faith, Rule 11 damages should be imposed. That is the law.

PROFESSIONALS ARE ENTITLED TO BE PAID FOR THEIR WORK

It has long been recognized in Arizona case law that fiduciaries are entitled to compensation for their efforts in administering a probate or acting as a guardian or conservator. *In re Estate of Margaret Cammack Smith,* 639 P.2d 380, 131 Ariz. 190 (Ariz. App. Div.2 10/22/1981). Fiduciaries are entitled to reasonable compensation for their services. Ariz. Rev. Stat. Sec. 14-3719, 14 5314 and 14-5414.

Indeed the licensing structure of the certified fiduciary system assumes that certified fiduciaries expect to be paid for their work, therefore they should meet certain standards prior to their being allowed to charge for their services.

Fiduciaries are entitled to reasonable reimbursement for hiring experts, such as attorneys or accountants, to help them in their tasks. *In re Estate of Gordon*, 87 P.3d 89, 207 Ariz. 401

(Ariz.App.Div.1 03/30/2004). But what if the fiduciary has special skills which he is providing to the estate, as well as serving as the fiduciary? What, then, may he charge?

Ariz. Rev. Stat. Sec. 14-3720 provides:

> If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

"Reasonable" has never been specifically defined by the Courts. Instead, the courts take a case-by case review of the charges. *Gordon*, *supra.* In a personal injury contingency fee matter, the Court has specifically refused to enact a specific rule related to the "reasonableness" of fees, and instead, required the court to review the fees on a case by case basis. *Matter of Conservatorship of Fallers*, 889 P.2d 20, 181 Ariz. 227 (Ariz.App.Div.1 05/31/1994) Overall, the case law has been less than forthcoming in providing guidance either for the fiduciary, the fiduciary's attorney or for the bench. Instead the consideration of whether a fee is unreasonable or not appears to be more of a judicial "I know it when I see it" approach.

Courts may not deny attorneys' fees without a valid legal basis in those cases in which attorneys' fees may be awarded such as cases arising out of contract. *Burnette v. Bender*, 184 Ariz. 301, 306, 908 P.2d 1086, 1091 (App. 1995) (total denial of attorney fees in family law context was abuse of discretion); .

Fees are often set in advance for public fiduciary organizations, but the theory behind their standard, and often lower rates, is that they take cases for which there will be no payment and society must supplement those services through tax dollars.

Such an approach by the Courts have not worked in other areas of the law, nor will it

work in determining reasonableness of the fiduciary's fees. Courts often reduce fiduciary's fees, not citing any particular reason other than the fiduciary charged too much. There does not appear to be any consistency among Arizona counties as to what factors should be used in determining a reasonable fiduciary fee. This presentation is designed to discuss existing case law in the fiduciary and other fee for personal services arenas, suggest guidelines for review of fees by the bench and to assist the fiduciaries in justifying both their hourly rates and time charged.

Both consumers and the Courts need to understand the responsibility placed on the shoulders of fiduciaries when they are appointed guardians, conservators or personal representatives. They make life and death decisions. They take over every aspect of an adult's life and autonomy. They manage complex estates which may be worth millions of dollars.

The only occupation which routinely makes the same types of serious decisions as fiduciaries are judges. Yet even attorney fiduciaries do not derive the same type of income from their fiduciary practice as sitting judges.

There is very little case law dealing with the reasonableness of fiduciary's fees. There is extensive case law dealing with the reasonableness of attorney's fees. Some of the reasoning in the cases which evaluate the reasonableness of attorney's fees is applicable to fiduciaries and is discussed herein.

COURT APPOINTED ATTORNEY'S FEES

Court appointed attorneys are not rubber-stamps bestowing credibility on a *fait accompli.* Their job is much more difficult. The court-appointed attorney is the voice for those who cannot speak, the mind for those who can no longer think--s the last defense against losing all control of their assets, their liberty and their person. And it is not just about money.....

There is a long line of United States Supreme Court cases which protect the right of the individual against loss of freedom and against personal invasions such as unwanted medical treatment.

> At common law, even the touching of one person by another without consent and without legal justification was a battery. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on *Law of Torts* 9, pp. 39-42 (5th ed. 1984). Before the turn of the century, this Court observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 129-130, 105 N. E. 92, 93 (1914). The informed consent doctrine has become firmly entrenched in American tort law. See Keeton, Dobbs, Keeton, & Owen, supra, 32, pp. 189-192; F. Rozovsky, *Consent to Treatment, A Practical Guide* 1-98 (2d ed. 1990). The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment. Until about 15 years ago and the seminal decision in *In re Quinlan*, 70 N. J. 10, 355 A. 2d 647, cert. denied sub nom. *Garger v. New Jersey*, 429 U.S. 922 (1976), the number of right-to-refuse-treatment decisions was relatively few. Most of the earlier cases involved patients who refused medical treatment forbidden by their religious beliefs, thus implicating First Amendment rights as well as common-law rights of self-determination. More recently, however, with the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times, cases involving the right to refuse life-sustaining treatment have burgeoned. See 760 S. W. 2d, at 412, *Cruzan V. Director*, 110 S. Ct. 2841, 497 U.S. 261 (U.S. 06/25/1990), p 17.

In another ruling, the Supreme Court case, Justice Stewart questioned:

> "May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally

justify the deprivation of a person's physical liberty. *O'Connor V. Donaldson*, 95 S. Ct. 2486, 422 U.S. 563 (U.S. 06/26/1975), pg 33."

Stating the obvious, the *Cruzan* court held, "We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute." *supra,* pg.35

And while it is well and good for the Courts, including Arizona courts, to promise due process, higher evidentiary burdens of proof and the imposition of the least restrictive alternatives possible–none of these promises can be fulfilled without the presence of qualified, competent court appointed counsel.

EXISTING CASE LAW

The Court held in *In re Estate of Margaret Cammack Smith*, 639 P.2d 380, 131 Ariz. 190 (Ariz.App.Div.2 10/22/1981), that a personal representative was entitled to reasonable compensation for his services pursuant to. A.R.S. 14-3719. Reasonableness of the personal representative's and his attorney's compensation is to be reviewed by the court which can order a refund if excessive compensation is found. This decision also held that a contract of the personal representative as to the amount of compensation to be paid the attorney is not binding upon the estate or the court. *In Re Schwint's Estate*, 183 Okl. 439, 83 P.2d 161 (1938); *In Re Lachmund's Estate,* 179 Or. 420, 170 P.2d 748 (1946); cf. *Elerick v. Rockland*, 102 Ariz. 78, 425 P.2d 103 (1967). Presumably this case would also preclude a fiduciary from binding a court's review of fees by entering into a contract with a prospective ward prior to the ward's incapacitation.

The intent behind the Uniform Probate Code, upon which Arizona's statutes governing decedents' estates, guardianships, protective proceedings and trusts are patterned, contemplates

minimal judicial supervision of fiduciaries who have been appointed under its provisions. In *Matter of Ray's Estate,* 25 Ariz. App. 40, 42, 540 P.2d 771, 773 (1975); *Estate of P.K.L. v. J.K.S.*, 943 P.2d 847, 189 Ariz. 487, 241 Ariz. Adv. Rep. 11 (Ariz.App.Div.1 04/17/1997).

The courts have recognized that payments to fiduciaries must be considered a priority debt and that payment of the fiduciary's fees is actually part of the administration of an estate. *Treadway* v. *Montague-Elliston*, 673 P.2d 331, 138 Ariz. 133 (Ariz.App.Div.1 10/04/1983) [Conservator may pay herself and her attorney prior to transferring property to personal representative.)]

The courts have recognized that fiduciaries often benefit not only their ward's or probate estates but also others and those "others" receiving a benefit must also pay the fiduciary for its services. *In re Monaghan"s Estate*, 220 P.2d 726, 70 Ariz. 349 (Ariz. 07/15/1950) [Sale of community property, including surviving spouse's share, was allowed to pay personal representative's administrative expenses and attorney's fees, though costs between estate and spouse apportioned on benefit analysis.] Prorating of expenses between the estates of several children in a family on a reasonably fair basis has been upheld. *In re Boyes' Estate*, 151 Cal. 143, 90 P. 454 (1907) (cited by Arizona opinions.)

Fees generated were reduced where conflict of interest and breach of loyalty was found by both fiduciary and fiduciary's counsel and the case remanded for further determination. *Snell & WIlmer L.L.P. v. Fegen*, 197 Ariz. 252, 3 P.3d 1172 (Ariz.App.Div.1 03/02/2000) In that case, it was alleged the amount charged by the attorney fiduciary per hour, $220, was unreasonable, but the appellate court did not address that issue.

For what services may a fiduciary be paid? Fiduciaries are entitled to charge for

statutorily required services. *Treadway, supra.* However, there may be some services required by statute, for which Arizona law would allow reimbursement, but other authorities either do not allow payment or otherwise restrict reimbursement. For example, only non-profit corporations may charge minimal monthly fees for acting as representative payees for Social Security payments, though Social Security regulations and governing statutes require those payees to perform certain tasks such as reporting on the use of funds. There is no prohibition on using non-Social Security funds or income to pay the fiduciary for completing this task.

The Court in *Day v. Arizona Health Care Cost Containment System Administration*, 109 P.3d 102, 210 Ariz. 207 (Ariz.App.Div.1 03/31/2005), agreed with AHCCCS that fiduciary fees generated by the filing and obtaining guardianship and conservatorship over an incapacitated veteran was not "medically necessary" thereby resulting in a reduction of the share of cost. Making medical decisions on behalf of another was not considered to be providing medical care. The fees were allowable, but could only be paid from the ward's allowance.

Courts have often used a "benefit" analysis to determine if either the fiduciary or their attorneys can be paid from an estate.

In *Matter of Estate of Killen*, 937 P.2d 1375, 188 Ariz. 569, 214 Ariz. Adv. Rep. 66 (Ariz.App.Div.1 04/18/1996), the Court allowed a personal representative reimbursement for attorney's fees in defending an invalid will which benefitted the personal representative, because it was statutorily mandated for a personal representative to defend a will.

Killen cited *Matter of Estes Estate*, 134 Ariz. 70, 654 P.2d 4 (App. 1982), for the proposition that a personal representative is entitled to reimbursement for attorneys' fees only for those services rendered to benefit the estate. In *Estes*, the executor, a bank, was surcharged for

negligent mishandling of the decedent's estate. The bank incurred attorneys' fees in defending against the charges that it mismanaged the estate; but the validity of the will was not challenged. The *Estes* court noted that an "executor is entitled to reimbursement for attorneys' fees only for services rendered to benefit the estate, not if the services were rendered to protect the executor's personal interest." 134 Ariz. at 80, 654 P.2d at 14. The matter was remanded for a determination of whether the attorneys' fees were for services rendered in good faith to benefit the estate. *In re Estate of Sadie R. Wright*, 647 P.2d 1153, 132 Ariz. 555 (Ariz.App.Div.2 03/30/1982)

The value of a personal representative's services should be evaluated based on considerations of necessity and reasonableness. *In re Smith's Estate*, 131 Ariz. 190, 639 P.2d 380 (1981).

The Court in *In re Estate of Goldie C. Brown*, 670 P.2d 414, 137 Ariz. 309 (Ariz.App.Div.1 05/19/1983), extended the "benefit" analysis to a "common fund doctrine." The Court found it is a general rule of equity long recognized in Arizona that a person or persons who employ attorneys for the preservation of a common fund may be entitled to have their attorney's fees paid out of that fund. *Steinfeld v.Zeckendorf*, 15 Ariz. 335, 138 P. 1044 (1914), affirmed, 239 U.S. 26, 36 S.Ct. 14, 60 L.Ed. 125 (1915). In situations where there was a conflict of interest between the personal representative and the estate, the probate court was given the power of the to consider use of the common fund theory of recovery of fees and to apply it to pay other attorneys who conferred a benefit on the estate. Again in that case, the Court declined to give more guidance as to fees stating:

"Whether and to what extent such fees should be allowed is a question best left to

> the probate court to decide in the sound exercise of its discretion on a case-by-case basis.....What we do hold is that the probate court has jurisdiction, upon a consideration of all of the facts and equities, to award such fees from the assets of the estate in the event that it feels, in the proper exercise of its discretion, that such fees are appropriate and justified. In arriving at a decision on this issue the probate court should take care to scrutinize the record to make certain that no award is made for activity that would duplicate the legitimate efforts of the original personal representative."

Two attorneys who shared responsibilities and services performed in minor childrens' personal injury matter had to be treated similarly by the trial court in its reviews of the percentages charged by the attorneys. *Matter of Conservatorship of Fallers*, 889 P.2d 20, 181 Ariz. 227 (Ariz.App.Div.1 05/31/1994).

Conservators are not entitled to fees which do not benefit the wards' estates. *In re Estate and Guardianship of Penni Purton*, 441 P.2d 561, 7 Ariz. App. 526 (Ariz.App.Div.2 05/29/1968), but the courts have "considerable discretion" in passing upon the reasonableness of charges made.

Personal representatives may even be able to recover their reasonable attorney's fees for defending a surcharge action in which the allegation is that the fiduciary charged an unreasonable fee. *In re Estate of Gordon,* 87 P.3d 89, 207 Ariz. 401 (Ariz.App.Div.1 03/30/2004). The *Gordon* court imposed a "good faith" requirement on the payment of fiduciary and attorney's fees which encompassed the benefit theory but extended it. The court declined to impose a per se rule that would always preclude an award of attorneys' fees to a personal representative who was unsuccessful in defending a surcharge action regarding her fees or her attorneys' fees.

A conflict of interest does not preclude recovery of fees, but should require the reviewing court to look at whether the fiduciary acted in the "best interests" of the beneficiaries. *In re CVR*

1997 Irrevocable Trust, 202 Ariz. 174, 42 P.3d 605 (Ariz.App.Div.1 03/19/2002); *State v. Belin*, 456 So. 2d 1237, 1241 (Fla. App. 1984).

Fiduciaries with specialized training, education or experience may be able to charge more if the fiduciary uses their specialized knowledge. *Lefkowitz v. Arizona Trust Co.*, 459 P.2d 332, 10 Ariz. App. 415 (Ariz.App.Div.2 10/02/1969] citing the *Restatement, Second, Trusts,* Comment d. under ? 242 of the *Restatement, Second, Trusts*, reads in part as follows:

> "d. Extra services. In the absence of a statute providing a definite rule fixing the amount of the trustee's compensation, a trustee who renders professional or other services not usually rendered by trustees in the administration of the trust, as for example services as attorney or as real estate agent, may be awarded extra compensation for such services. In fixing the amount of such compensation the court will allow an amount which under all the circumstances it considers to represent the fair value of the services."

See also, III, *Scott on Trusts* (Third Ed.1967), ? 242.2; and Bogert, *Trusts and Trustees* (Second Ed.1962) 977, at 387 et seq. The latter authority states at pages 388-389 that "A showing of the performance of unusually skillful, arduous, or prolonged work should be required, and detailed proof should be demanded."

It was not unethical for an attorney handling a probate to charge a commission to sell real property in the probate, but he could not both charge a commission and an hourly rate for the same work, nor could he charge an excessive fee. *In re A Member of State Bar of Arizona*, 764 P.2d 1, 158 Ariz. 516 (Ariz. 10/04/1988).

Disproportionate compensation to a personal representation should be allowed only if extraordinary services were necessarily performed. See *In re Elerick's Estate*, 11 Ariz. App. 559, 466 P.2d 778 (1970); *Feffer v. Newman*, 17 Ariz. App. 273, 497 P.2d 389 (1972); *Busenbark v. Smith*, 55 Ariz. 1, 97 P.2d 533 (1940); *In re O'Reilly's Estate*, 27 Ariz. 222, 231 P. 916 (1925).

In *In Re Smith's Estate, supra.,* a fee of more than twenty percent of the value of the estate was considered disproportionate, but allowed based on the complexity of the case.

Some states such as California, impose the amount of fees that can be charged in probates. This may result in overcharging the smaller, simpler estates, and may under reflect the costs of more complex situations. Furthermore, there are procedures even in these cases where additional fees can be sought for the extraordinary case, though California does not let an attorney fiduciary charge both as a fiduciary and as an attorney, in the same case, without obtaining prior court approval and a specific finding that such an arrangement is in the best interest of the estate. *In re Estate of Shiffler*, No. A106219 (Cal.App. Dist.1 03/14/2005).

The Arizona Supreme Court adopted Fiduciary Code of Conduct prohibits self dealing and requires that all fees charged be reasonable and in the best interests of the estate. (Standards 2b, 4i and 5a. See Appendix)

CONSIDERATIONS FOR SETTING FEES

Economics

Private fiduciaries become certified to be able to charge fees. A fiduciary who cannot pay his own bills because his hourly rate does not accurately reflect the true costs of his business may not be qualified to handle the finances of another person. Each private case should be profitable and should not be supported by other private cases. Vanderheiden, Richard T., *Some Thoughts on Fiduciary Compensation*, Arizona Fiduciary's Association.

The types of services a fiduciary intends to offer may offer some guidance as to what hourly rate will fairly compensate the fiduciary. For example, Salary.com lists an average annual salary for an RN casemanager at $59,750. A fiduciary only offering guardianship services, who

has nursing training, might use such information as a bench post from which to develop a business operating budget and set fees. The fiduciary would have to add in the costs of administration, compliance with regulatory authority, continuing education, marketing and other business costs. A well developed business plan can set forth all of these costs and give the fiduciary an accurate picture of what is needed. Into these costs, fiduciaries should calculate the necessity for back-up coverage should the fiduciary take a vacation or become ill. The fiduciary should recognize they cannot work 24 hours a day, seven days a week. Their rate should be high enough for them to make a living.

Fiduciaries who offer varied services should factor in all of the types of services offered.

Fiduciaries who have specialized training or licensing may need to charge more consistent with that training.

Fiduciaries may be subjected to regulation and audit from the courts, the Administrative Office of the Courts (AOC), the Social Security Administration, AHCCCS, taxing authorities and the Veteran's Administration, to name a few.

Random audits by AOC can take a few days to months, require preparation, physical space for the auditors, and a staff member available at all times to answer the auditor's questions. The cost can be enormous, even if irregularities are not found. The fiduciary cannot pass this cost onto the individual clients AOC chose to audit, but instead must pass the overall cost onto all of his clients through his overall hourly billing rate.

Fiduciaries are required to answer complaints and inquiries, regardless of their merit, and the cost of doing so, again, is not passed on to the individual client, but is absorbed into the overall billing rate.

Attorneys are also slaves to their own overhead and must charge hourly rates commiserate with their overhead. In court-appointment systems where attorneys are appointed on a flat-fee basis, the attorneys may try to make up for the loss of the per-hour rate in the volume of cases they take leading to poor quality of representation. A review of the indigent criminal defense format is instructive on how well such a system works–it does not.

Arizona Ethics Opinion 01-06 held, "A lawyer should not enter a contract to provide legal services paid by a third party if the contract might induce the lawyer improperly to curtail services to a client or to perform them in a way contrary to the client's interests." The panel wrote this concerning a question presented as to whether it was permissible for an attorney to enter a county-offered contract to provide representation of indigent defendants in criminal cases. The panel reasoned, "Therefore, a lawyer should not undertake government-funded representation of indigent defendants on terms that would prevent her from representing each defendant diligently and competently." The contract in question provided for a flat-fee for most cases with procedures to increase the fee in extraordinary cases. The panel cited ER 1.1 Competence, ER 1.3 Diligence, ER 1.5 Fees, ER 1.7, Conflict of Interest: General Provisions, ER 1.8 Conflict of Interest: Prohibited Transactions; and ER 5.4 Professional Independence of a Lawyer as supporting its opinion.

Similarly, in Ariz. Op. 99-08, an insurance company's rules and pre-approval requirements limiting the legal services for which the insurance company would compensate the insured's counsel had an "inherent tendency to create conflicts of interest between the third party auditor, the attorney's self-interest, and that of the client."

Even a system based on an hourly rate would be unethical unless that hourly rate were

consistent with rates customarily charged in the market place. Otherwise, persons of means who had an attorney in place when their disability occurred might receive more legal services and attention than those who had less means, no attorney and relied solely upon the court appointment system.

Finally, who would pay for the court-appointed attorney if not the elder for whom guardianship is being sought. Certainly governmental entities could not afford to pay for all of the attorneys needed. And, if they were able to rationally make their own decisions, would not they probably want the best services their money could buy?

Court-appointed attorneys should not be treated differently than medical providers. If an incapacitated disabled person is taken to a hospital, he does not get to negotiate the price of the emergency room or the hourly rate of the attending physician. Admittedly, his insurance company or Medicare might have conducted such negotiations prior to the hospitalization. But, if that has not occurred, the patient is stuck with the charges with virtually no recourse other than not paying. Under our current system, the "patient" can at least object to the court-appointed attorney's fees either personally or through his fiduciary.

Liability Issues

Fiduciaries who agree to handle the "hard cases" should charge additional hourly amounts for their willingness to take on these cases as they usually will be more time consuming and prevent the fiduciary from taking other, easier cases.

Some wards present a higher potential for liability for the fiduciary and this factor should be taken into consideration. For example being the guardian of a mentally ill ward with a propensity for violence would justify a charging a higher rate than taking on the guardianship of a

docile, demented non-ambulatory great grandmother.

The difficult wards present a higher potential for violence to others, violence to the fiduciary's staff and violence to the fiduciary.

Wards whose families are already embroiled in litigation over the ward or the ward's assets present a higher potential for liability, complaints and litigation for the fiduciary and this should be considered.

Court appointed attorneys are not relieved of ethical responsibilities or malpractice claims just by virtue of the court-appointment.

Particular Case Issues

Wards who have extensive income producing real property take more time than those whose assets are in a brokerage for both the court-appointed attorney and the fiduciary.

The fiduciary should consider how much staff time might be involved in effectively managing the ward's estate. Charging for staff time is a necessary and appropriate function. Under AOC regulations, non-fiduciaries can perform services provided they are under the direct supervision of the fiduciary. While there is no case law allowing fiduciaries to charge for their staff time, an analogy can be drawn from case law that allows lawyers to charge for paralegal and legal assistant time. *Continental Townhouses East Unit One Association v. Brockbank*, 733 P.2d 1120, 152 Ariz. 537 (Ariz.App.Div.1 08/05/1986) [appropriate to charge paralegal time at reduced hourly rate than that of lawyer as it ultimately reduces costs of litigation.]

Are there family members or visitation issues which will require additional fiduciary time? The ward may be easy to deal with, but the ward's family may be a nightmare.

In determining whether to award attorney's fees to a prevailing party, the trial court may

consider the following factors:

> (1) the merits of the claim or defense presented by the unsuccessful party; (2) whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result; (3) whether assessing fees against the unsuccessful party would cause extreme hardship; (4) whether the successful party prevailed with respect to all of the relief sought; (5) the novelty of the legal question presented; (6) whether the successful party's claim or defense was adjudicated previously in this jurisdiction; and (7) whether an award would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues. *In re Estate of Parker*, 217 Ariz. 563, ¶ 32, 177 P.3d 305, 311 (App. 2008).

Perhaps these same factors could be used as authority to support the fiduciary's and attorney's fees for defending against unreasonable family members.

Reasonableness Within the Community

It is helpful to understand what other fiduciaries are charging within the same geographic location, if, for no other reason, to allow for open competition in the marketplace.

It is also evidence of the reasonableness of the particular fiduciary's rate if others, in similar circumstances who provide similar services, charge similar rates. This is not to say fiduciaries should agree on fixed rates as this would probably violate antitrust laws.

But, case law relating to attorney's fees states that evidence as to the rates customarily charged within the community is relevant to determining the reasonableness of fees. *Blaine v. Blaine,* 63 Ariz. 100, 108, 159 P.2d 786, 789 (1945) [divorce case]. *Crouch v. Pixler,* 83 Ariz. 310, 315, 320 P.2d 943, 946 (1958) [contract action]. Similar evidence as to fiduciary's rates customarily charged should be no less relevant.

Other Elements

The other elements courts have considered relevant in determining a reasonable attorneys'

fee were enumerated by the Supreme Court in The basic analysis is the same: is there something special about this case that would warrant extraordinary fees and what benefit was derived by the services, if any? *Schwartz v. Schwerin,* 85 Ariz. 242, 336 P.2d 144 (1959). In *Schwartz*, the amount of compensation had not been agreed upon by the parties, and the court held that the attorney's claim must be based on *quantum meruit* to establish the "reasonable value of services rendered." Id. at 245, 336 P.2d at 146.

The court identified the following factors to be considered:

> (1) the qualities of the advocate : his ability, his training, education, experience, professional standing and skill;
> (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation;
> (3) the work actually performed by the lawyer : the skill, time and attention given to the work;
> (4) the result: whether the attorney was successful and what benefits were derived.

The court noted that no one element should predominate or be given undue weight.

The elements enumerated in *Schwartz* are similar to the considerations Arizona courts have given fiduciary fees in the few reported cases there are, described above.

Using the factors of *Schwartz* was approved by the authors of the Comment to Rule 33 of the Uniform Probate Rules effective in January, 2009. Comment to 17B A. R. S. Rules Probate Proc., Rule 33, AZ ST PROB Rule 33.

It is unethical in Arizona to charge an excessive fee. Attorneys who have knowledge that another attorney charged an excessive fee should report it to the State Bar. Ariz. Op. 94-09 regarding alleged excessive fee in routine probate.

JUSTIFYING THE FEE

Conditioning the Players

In cases which are being litigated, or require a number of court appearances for any reason, both the fiduciary and court-appointed counsel should bring up the issue of fees before the court, so that the judge is reminded that each appearance and each task assigned costs money. This way the court is conditioned that the fee will be large.

If opposing counsel makes unusual demands, ask who will pay for it.

Family members can also be conditioned as to the cost of fees to avoid complaints later. When they make demands, remind them of the costs involved.

If a case appears to be getting out of hand, file a petition for instructions so that the Court is placed on notice that extraordinary events are occurring.

File a petition to approve payment of extraordinary fees–before the payment occurs. Such orders make the accounting approvals go smoothly.

Affidavit by Fiduciary

Most fiduciaries and attorneys file perfunctory affidavits with their itemizations claiming the work performed was reasonable and necessary. Consider filing an extraordinary affidavit justifying the fees setting out every problem with the case, every delay and every irritation. (See Appendix)

Itemization of Hours/Expenses

In Schweiger v. China Doll Restaurant Inc., 673 P.2d 927, 138 Ariz. 183 (Ariz.App.Div.1 07/28/1983), the court set the standard for how attorneys should present their billings to judges to justify the hours charged. The Court wrote:

> The affidavit of counsel should indicate the type of legal services provided, the date the service was provided, the attorney providing the service (if more than one attorney was involved in the appeal), and the time spent in providing the service... It is insufficient to provide the court with broad summaries of the work done and time incurred. "[A]ny attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent." *In re Hudson & Manhattan R.R. Co.*, 339 F.2d 114, 115 (2d Cir.1964).

In order for the court to make a determination that the hours claimed are justified, the fee application must be in sufficient detail to enable the court to assess the reasonableness of the time incurred. Practitioners are advised to prepare their summaries based upon contemporaneous time records which indicate the work performed by each attorney for whom fees are sought. If counsel expects that the fee application will be opposed on the grounds that the hours claimed are excessive, counsel may find that it is useful to submit actual time records to support the fee request. *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 730 (5th Cir.1982).

The same standard can be used by fiduciaries as it is consistent with the requirement that all expenditures be supported by documentary evidence. *In re Schuster's Estate*, 35 Ariz. 457, 475, 281 P. 38, 45 (1929); *In re Estate of Mary Greene Wiswall*, 464 P.2d 634, 11 Ariz. App. 314 (Ariz.App.Div.2 01/28/1970).

Such a procedure is already required by local rules in Maricopa and Pima Counties. (See Appendix.)

If you are charging a higher rate for some services, such as an attorney rate for providing legal services as a fiduciary, explain on those entries why the higher rate was charged, such as: "Discussed with case manager potential liability to estate regarding ward's behavioral tendencies toward violence, possible medical and behavioral modification intervention to prevent same and plan of action should intervention techniques fail."

If you are concerned the court will not approve your fees, or you face objections, do not hesitate to contact other AFA members who might serve as experts to testify as to the reasonableness of the fees.

APPENDIX

Fiduciary Code of Conduct

Standard 2b

The fiduciary shall avoid self-dealing or the appearance of a conflict of interest. Self-dealing or a conflict of interest arises where the fiduciary has some personal or agency interest other individuals may perceive as self-serving or adverse to the position or best interest of the ward, protected person, or decedent. In situations where no other services are available, the fiduciary shall disclose the potential conflict in a petition to the superior court, seeking approval prior to the provision of services.

Standard 4i

The fiduciary shall ensure all fees and expenses incurred for the protected person by the fiduciary, including compensation for the services of the fiduciary are reasonable in amount and necessarily incurred for the welfare of the protected person.

Standard 5

A fiduciary shall ensure all fees and expenses for the estate, including compensation for the fiduciary, are reasonable in amount and necessarily incurred in the administration of the decedent's estate.

Code of Professional Responsibility

ER 1.1. Competence

1. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ER 1.3. Diligence

1. A lawyer shall act with reasonable diligence and promptness in representing a client. Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See ER 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in ER 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See ER 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See ER 1.2.

ER 1.5. Fees

1. (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) the degree of risk assumed by the lawyer.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing.
(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof;
(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as "earned upon receipt," "nonrefundable" or in similar terms unless the client is simultaneously advised in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) each lawyer receiving any portion of the fee assumes joint responsibility for the representation;
(2) the client agrees, in a writing signed by the client, to the participation of all the lawyers involved; and
(3) the total fee is reasonable.

ER 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

ER 1.8. Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by ER 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

(2) make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities; or

(3) settle such allegations, claims, or potential claims with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(l) A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

ER 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of ER 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

UNIFORM RULES OF PROBATE PROCEDURE

Rule 33. Compensation for Fiduciaries and Attorney's Fees

A. All petitions requesting approval for payment of compensation to personal representatives, trustees, guardians, conservators, or their attorneys for services rendered in proceedings under A.R.S. Title 14 shall be accompanied by a statement that includes the following information:

1. If compensation is requested based on hourly rates, a detailed statement of the services provided, including the tasks performed, the dates that such services were rendered, the time expended for performing the services, the name and position of the person who performed the services, and the hourly rate charged for such services;
2. An itemization of costs for which reimbursement is sought that identifies the cost item, the date the cost was incurred, the purpose for which the expenditure was made, and the amount of reimbursement requested; and
3. If compensation is not based on hourly rates, an explanation of the fee arrangement and computation of the fee for which approval is sought.,

B. Copies of all petitions for compensation and fee statements shall be provided to or served on each party and person who has appeared or requested notice in the case. Proof of such service shall be filed with the court.

C. If a petition for compensation or fees is contested, the objecting party shall set forth all specific objections in writing, and a copy of such written objections shall be given to or served on each party and person who has appeared or requested notice in the case. Proof of service or delivery of such notice shall be filed with the court.

D. When an attorney or fiduciary fee statement accompanies an annual accounting, the fee statement shall match the charges reported in the annual accounting or a reconciliation of the fee statement to the accounting shall be provided by the fiduciary.

E. The superior court may adopt fee guidelines designating compensation rates that may be used in determining the reasonableness of fees payable to certified fiduciaries in cases under A.R.S. Title 14.

F. Unless ordered by the court, neither a personal representative nor a personal representative's attorney is required to file a petition for approval of such person's fees.

Added Sept. 16, 2008, effective Jan. 1, 2009.

COMMENT

This rule is not intended to require court approval of fiduciary fees or attorneys' fees in all circumstances. Instead, this rule clarifies that if approval of fees is requested, the court may require that certain information be provided to assist the court in determining the reasonableness of the fees. In many circumstances, especially with respect to decedents' estates and trusts, court approval of fiduciary fees and attorneys' fees is not required unless an interested person specifically requests that the court review the reasonableness or propriety of compensation paid to a fiduciary or attorney. See, e.g., A.R.S. § 14-3721.

A.R.S. § 14-5651 limits the classes of persons or entities who are entitled to receive compensation for acting as a guardian, a conservator, or a personal representative.

This rule is not intended to apply when a party has requested that the court award the party attorneys' fees against another party, such as an award of sanctions or an award of attorneys' fees in a matter arising out of contract. Instead, this rule applies only to those circumstances in which a fiduciary or an attorney seeks compensation from the estate of a ward or protected person, a decedent's estate, or a trust.

Pursuant to Rule 7(A), fee statements are not confidential documents or information.

In assessing whether compensation paid to or requested by a fiduciary or an attorney is reasonable, the court should consider a variety of factors, not just the amount of time spent on a particular task. See *Schwartz v. Schwerin*, 85 Ariz. 242, 245-46, 336 P.2d 144, 146 (1959) (holding that in determining the reasonableness of attorneys' fees, the court should not give undue weight to any one factor). For example, when reviewing the fiduciary's compensation, the court also should consider the amount of principal and income received and disbursed by the fiduciary, the fees customarily paid to agents or employees for performing like work in the community, the success or failure of the administration of the fiduciary, any unusual skill or experience that the particular fiduciary may have brought to the work, the fidelity or disloyalty displayed by the fiduciary, the degree of risk and responsibility assumed by the fiduciary, the custom in the community as to allowances to trustees by settlers or courts and as to fees charged by trust companies and banks, the nature of the services performed in the course of administration (whether routine or involving skill and judgment), and any estimate that the fiduciary has given of the value of the services. See Mary F. Radford, George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees § 977* (3d ed. 2006). Similarly, when reviewing the attorney's compensation, the court should consider, among other factors, the attorney's ability, training, education, experience, professional standing, and skill; the character of the work performed by the attorney (its difficulty, intricacy, and importance, time and skill required, and the responsibility imposed); the work actually performed by the attorney (the skill, time, and attention given to the work by the attorney); and the success of the attorney's efforts and the benefits that were derived as a result of the attorney's services. See *Schwartz*, 85 Ariz. at 245-46, 336 P.2d at 146.,

17B A. R. S. Rules Probate Proc., Rule 33, AZ ST PROB Rule 33

Current with amendments received through 6/24/09

Local Rules of Practice for Superior Courts

Maricopa County

Rule 5.7. Petitions for Compensation

a. All petitions requesting the approval for the payment of compensation to fiduciaries as defined in A.R.S. § 14-1201 (personal representatives, guardians, conservators and trustees) or attorneys for services rendered in proceedings under Title 14, Arizona Revised Statutes, must be accompanied by a statement of the net value of the estate, together with a detailed statement of the services rendered, including the tasks performed, the date each task was performed, the amount of time involved in performing each task, the name and position of the person who performed each task and the results achieved. The total time, hourly rate, and total charge made by each person must be reported in the detailed statement, and the total fee must be clearly set forth in the petition and in the proposed form of order. The detailed statement must also include an itemization of costs by date, payee, purpose and amount. A copy of any such petition for compensation shall be given or served as required by law on each party interested in the estate or, if such party is represented by counsel, to her/his/its attorney, and the court and proof of such service shall be filed with the court.

b. Where a fiduciary has been appointed guardian or conservator for either a minor or an adult and has rendered services using an independent contractor or an individual other than the person appointed guardian or conservator or, in the case of a corporate fiduciary, other than the person who executed the Order to Guardian and/or Order to Conservator, the fiduciary shall include in its petition for compensation a statement of the rate(s) paid each independent contractor or, if other than a full-time employee, the hourly wage paid the employee, the independent contractor's or employee's qualifications to render services and the rate(s) at which the estate was charged for each independent contractor's or employee's services.

c. In those cases where a guardian, conservator or trustee, other than the Maricopa County Public Fiduciary or Arizona Veterans Service Commission, is required to file an accounting with the court, the fiduciary shall, within 90 days of appointment and thereafter with each required annual accounting, file an estate management plan on the court-approved form setting forth (1) an estimate of fiduciary fees, if any, anticipated to be incurred during the next accounting period and (2) a summary of the management plan for the next accounting period including any major changes in the management of the estate or placement of the ward expected to occur in the next accounting period.

d. When attorney or fiduciary fee statements accompany an annual accounting, the fee statements shall either match the charges reported in the annual accounting or a reconciliation of the fee statement to the annual accounting shall be provided by the fiduciary.

Rule 5.8. Orders for Appointment of Attorney, Physician and Court Investigator

a. In cases pursuant to Titles 14 or 36 seeking appointment of a guardian or conservator for an adult, except for those requesting appointment of a temporary guardian or conservator, the petitioner shall submit to Probate/Mental Health Court Administration at least 30 days prior to the scheduled hearing a form of order appointing attorney, physician and court investigator. The

petitioner must obtain from the Office of Court-Appointed Counsel the name of the attorney to be appointed and include the name in the order. The proposed form of order must also set forth the name of the physician to be appointed and the date of the scheduled hearing on the petition for appointment of a guardian or conservator. In those cases requesting appointment of a temporary guardian or conservator, the proposed order appointing attorney, physician and court investigator shall be submitted at the time of filing of the case.
b. The presiding judge of the Probate/Mental Health Department may designate persons assigned to the Probate/Mental Health Court Department as special commissioners with authority to sign orders for appointment of attorneys, physicians and court investigators.
c. Unless waived or deferred, all petitions for appointment of a court investigator shall be accompanied by a receipt showing payment of the court investigator service charge as established from time to time by the presiding judge of the Probate/Mental Health Department pursuant to A.R.S. §§ 14-5314 and 14-5414.

Pima County Rule 9.1

(j) Compensation of attorneys and fiduciaries
In all matters filed in court related to compensation of fiduciaries and attorneys, the party requesting compensation or approval of compensation shall file a verified, detailed statement of the services rendered and the time involved. If a motion for attorneys' fees is contested, opposing parties may respond to the motion, and a hearing may be granted in the discretion of the court. In addition, the court may refer issues relating to the value of services to a Special Master under Rule 53.

Pinal County

Rule 5.5 Applications for Compensation
All applications of fiduciaries and attorneys for compensation for services rendered in all proceedings under Title 14, Arizona Revised Statutes, must be accompanied by a statement as to the gross and the net value of the estate together with a detailed statement of the services rendered, the time involved and the results achieved. A copy of any such application for compensation shall be served on each party in the estate and the court and proof of such service filed with the court.